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SUPERIOR COURT OF STATE OF ARIZONA
COUNTY OF YAVAPAI

STATE OF ARIZONA,

Plaintiff,

vs.

JAMES ARTHUR RAY,

Defendant.

CASE NO. V1300CR201080049

Hon. Warren Darrow

DIVISION PTB

**DEFENDANT JAMES ARTHUR RAY'S
REPLY IN SUPPORT OF MOTION FOR
CONTINUANCE OF PRESENTENCING
HEARING AND SENTENCING**

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SANDRA M. GRESHAM, CLERK
BY: Kelly Gresham

1 The State's Objection improperly disregards the prosecution's constitutional obligations
2 and treats important proceedings as mere formalities. The State's Objection also fails to extend
3 the most basic courtesy to a respected member of the Prescott legal community. For the reasons
4 stated in the opening motion, the failure to grant a reasonable continuance to accommodate Mr.
5 Kelly's medical condition will needlessly create yet another appellate issue—one that could be
6 avoided by a minimal extension of courtesy. The State's Objection also necessitates the
7 following corrections and clarifications of fact and law:

8 *First*, the State grossly misconstrues the importance of Mr. Kelly's involvement at Mr.
9 Ray's presentencing hearing and sentencing. The State notes that undersigned attorneys from
10 Munger, Tolles & Olson LLP may be available next week to represent Mr. Ray, and cites an
11 inapposite case involving attorneys from the same law firm as authority that the continuance
12 should be denied. *See* State's Objection at 3, 6-7. This argument is misplaced in several respects.
13 As an initial matter, as the Court has recognized, attorneys are not fungible. *See* Court Order,
14 September 20, 2011, at 1 ("The Court agrees with the Defendant, of course, that attorneys are not
15 'fungible.'"). Furthermore, the availability of other competent counsel is not dispositive in the
16 constitutional counsel-of-choice analysis. *See United States v. Gonzalez-Lopez*, 548 U.S. 140,
17 148 (2006) ("Deprivation of the right is 'complete' when the defendant is erroneously prevented
18 from being represented by the lawyer he wants, regardless of the quality of the representation he
19 received. To argue otherwise is to confuse the right to counsel of choice—which is the right to a
20 particular lawyer regardless of comparative effectiveness—with the right to effective counsel—
21 which imposes a baseline requirement of competence on whatever lawyer is chosen or
22 appointed."). Most importantly, Mr. Kelly is not a member of Munger, Tolles & Olson LLP.
23 This issue would not arise if Mr. Li, Ms. Do, or Ms. Seifter became unavailable. Mr. Kelly is
24 local counsel—the attorney familiar with county practices and steeped in community values. For
25 that reason, he is Mr. Ray's counsel of choice for sentencing. The Court has already
26 acknowledged that this preference warrants deference. *See* Order at 1 ("[D]eference should be
27 accorded to the Defendant's and the defense team's preferences in determining the specific trial-
28 level assignments of various counsel. This is true regardless of the number of attorneys who work

1 on a case. As was also noted by the Defendant, Mr. Kelly is local counsel, and that status, in
2 itself, is an important consideration.”). And the federal and Arizona Constitutions protect this
3 preference, conferring a counsel-of-choice right that cannot lightly be abrogated in the name of
4 scheduling concerns.

5 *Second*, the State misstates the record in several respects. The Court’s order vacating the
6 original sentencing date was not a delay caused by the Defense. *Cf.* State’s Objection at 5. As
7 the Court is aware, the Presentence Report was not yet completed at that time. With regard to
8 other delays alleged by the State, the record of the July 29, 2011 sentencing hearing must speak
9 for itself.

10 *Third*, the State asserts, in a bare sentence, that “[s]entencing in this matter is not complex
11 and should proceed forthwith.” State’s Objection at 7. This assertion is inappropriate and
12 incorrect. It should go without saying that sentencing is an absolutely critical phase of this
13 criminal proceeding. It is the moment that most directly affects Mr. Ray’s liberty and
14 constitutional rights. Mr. Ray’s right to counsel of choice is *at its height* during sentencing.

15 *Fourth*, the State suggests that “the release to work by [Mr. Kelly’s] doctor of September
16 26 is two days before the rescheduled hearing will resume, effectively giving Mr. Kelly additional
17 time to prepare.” State’s Objection at 7. This is incorrect. As set forth in Mr. Kelly’s affidavit,
18 filed with the Court yesterday, Mr. Kelly is being evaluated today and does not yet have a
19 “release to work.”

20 The Defense respectfully urges this Court to grant a continuance and hold a status
21 conference on Monday, September 26, so that the Court can reach a ruling with the benefit of
22 information regarding Mr. Kelly’s medical condition. The request is reasonable, made in good
23 faith, and consistent with Mr. Ray’s constitutional rights—under the Sixth Amendment, the Due
24 Process Clause, and the Arizona Constitution—to representation by the counsel of his choice.
25 *See Gonzalez-Lopez*, 548 U.S. at 144 (“[E]rroneous deprivation of the right to counsel of choice .
26 . unquestionably qualifies as ‘structural error.’”).

1 DATED: September 22, 2011

MUNGER, TOLLES & OLSON LLP

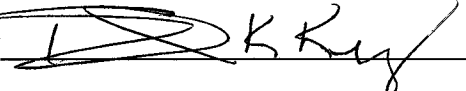
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8
9 Copy of the foregoing delivered this 22nd day
of September, 2011, to:

10 Sheila Polk
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13 by 